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(20,061)

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Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. FRANK,

Plaintiffs-in-Error,

against

JOSEPH VOLLKOMMER, JR., as Trustee in Bankruptcy of the Estate of Jacob Vogt, a Bankrupt, and JACOB VOGT,

Defendants-in-Error.

OCTOBER TERM, 1906.

No. 184.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

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(20,051)

Supreme Court of the United States.

SOLON L. FRANK and SAMUEL FRANK, doing business under the name of S. L. & S. Frank,

Plaintiffs-in-error,

AGAINST

JOSEPH VOLLKOMMER, JR., as trustee in bankruptcy of the estate of Jacob Vogt, a bankrupt, and JACOB VOGT,

Defendants-in-error.

OCTOBER TERM, 1906, No. 184.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

Preliminary Statement.

In anticipation of certain statements which may be made by plaintiffs-in-error, counsel wishes the Court here to be clearly and certainly advised of the following facts, and accordingly sets them forth, notwithstanding that plaintiffs-in-error may make some reference thereto in their brief:

1. The action was brought and tried as an action *by the trustee* to set aside a chattel mortgage of $8,500, made by the bankrupt, *within four months of the adjudication of bankruptcy*, as made to

hinder, delay and defraud creditors (*Record*, pp. 3, 4, 5, 8, 24, 29, 32, 109).

2. *Before* adjudication of bankruptcy, the mortgaged chattels were sold free of liens *by the receiver in bankruptcy* (certain creditors having stopped by injunction an attempted sale thereof by the plaintiffs-in-error, the chattel mortgagees), and the Receiver took possession thereof *with the consent of the plaintiffs here, and certain creditors.* The proceeds of the sale, amounting to $5,481.47, were deposited by the receiver, pursuant to an order, *as a special fund*, to await the further order of the Court, the lien of the mortgage, if any, to attach to such proceeds as to the mortgaged chattels; *but said order did not provide in what court the alleged lien of plaintiffs here should be determined*, nor confine the trustee or any party in the choice of a forum for the purpose of testing the validity of such alleged lien (*Record*, pp. 6, 12–14, 17, 63–64).

3. *It is not true, and there is absolutely no support in the record for any statement, that the trustee ever instituted any proceeding in the bankruptcy court, with a view to obtaining the fund aforesaid;* or that he was dissatisfied with the bankrupt's testimony before the Referee in the bankruptcy court; or that the trustee resorted to the State Court from any unfair or ulterior motives. *It is true* that the trustee conducted the usual general, preliminary and advisory examination of the bankrupt in the bankruptcy court—*nothing more.* The trustee brought the suit in the State Court simply because his counsel advised him, after examination of the law and decisions, that the State Court was the proper place in which to bring it.

4. *It is not true* that the negligence cases referred to in the record were never tried, nor is there any support for such statement in the record; as a matter of fact, *judgments were recovered by plaintiffs in each of these suits.*

5. Although it is correct that the plaintiffs-in-error, chattel mortgagees, took possession of the mortgaged chattels, *it is also true that they were wrested from their possession by the bankruptcy court*, by its process of injunction and its Receiver (*Record*, pp. 63, 64).

6. Any mortgages held by plaintiffs-in-error prior to the one in suit were never properly filed in the proper county (*Record*, p. 75).

7. As the bankrupt testified, the mortgage in suit was made with the following understanding (*Record*, p. 42):

> "We were talking about making it $8,500 on account of them law suits I had against me, *and to protect Frank and myself.* Mr. Frank told me, '*If you make the mortgage $8,500, if they do sue you and get a judgment against you, they cannot get nothing. I have a mortgage on everything you have got.*' "

8. It nowhere in the record affirmatively appears that there were not judgment creditors represented by the trustee; *indeed, the inference is that there were such*, as the entire bankruptcy record, with some minor exceptions, was in evidence before the Court below, but is not returned to this Court (*Record*, p. 82). *Nor was any motion made at the trial to dismiss the complaint, or for other relief, on the ground that the trustee did not represent judgment creditors* (*Record*, pp. 31, 32, 82, 83).

It has been thought proper by defendant-in-error VOLLKOMMER to make the foregoing statements of fact, although many of them may be to points immaterial or not in review in this court, in order that this Court might be protected against any erroneous impression of the substantial and abiding merit of the cause of the plaintiff-trustee, which might be presented to it.

POINTS
ON BEHALF OF DEFENDANT-IN-ERROR VOLLKOMMER.

I.

The Supreme Court of the State of New York had jurisdiction of the cause.

(a)

Suits *by the trustee* in bankruptcy (and the case at bar is one), are cognizable in the State Courts, by the following clear prescription of the National Bankruptcy Act (Sec. 23, Subd. *b*) :

> "Suits by the trustee shall only be brought or prosecuted in the Courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section sixty, Subdivision b, and Section Sixty-seven, Subdivision e.*"

And also, more specifically, as to suits to set aside fraudulent conveyances, of which the case at bar is an example *(Record*, pp. 3–8, 23, 24, 29, 30), by the following sections :

> SECTION 67; SUBDIVISION E. "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act, subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover

and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Corrt which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

SECTION 70; SUBDIVISION E. "The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the persons to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

The words *in italics* in each of the above quotations from the Act, were added by the Amendatory Act of the 5th February, 1903; but in the case at bar we have not to deal directly with the Act as amended, but only as originally passed on the 1st of July, 1898, since this action was commenced on the 20th December, 1902 (*Record*, p. 1), before the amendment; and since the Amendatory Act itself provides (Sec. 19) that it shall not apply to pending cases. Moreover, the amendment could not affect the question here, which is, essentially—Has the bankruptcy court *exclusive* jurisdiction of this cause?—because it merely gives to the bankruptcy court *concurrent*, not *exclusive*, jurisdiction over the actions referred to, of which this is one.

The Amendment gives the bankruptcy court jurisdiction where it had none before. The State Courts retain jurisdiction as before, simply dividing it with the bankruptcy court (*Gregory vs. Atkinson*, 127 Fed. Rep., 183; *Collier on Bankruptcy*, 5th Ed., pp. 265–7, 269, 272, *infra*).

It is not questioned on this Record that the Supreme Court of the State of New York, in and for the County of Kings, wherein the trustee brought this suit, and this cause was tried, is the Court "where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them [suits], if proceedings in bankruptcy had not been instituted."

The text-writers and the cases, in amplification of the manifest intent and effect of the statute quoted, have declared in unequivocal terms for the jurisdiction of the State Courts in cases similar to the one at bar:

Bardes vs. Hawarden Bank, 178 U. S. 524, and two following cases.
Collier on Bankruptcy, 5th Ed., p. 272, *infra.*
Wall vs. Cox, 181 U. S., 244.
Brandenburg on Bankruptcy, 3rd Ed., Sec. 581.
Jones vs. Schermerhorn, 53 N. Y. App. Div., 494.
Silbertstein vs. Stahl, 32 N. Y. Miss., 353; *affirmed*, 63 N. Y. App. Div., 614; *affirmed*, 171 N. Y., 649.
Small vs. Muller, 67 N. Y. App. Div., 143.
Bryan vs. Madden, 109 N. Y. App. Div., 876.

Foster's Federal Practice, 3rd Ed., p. 1085, where is found an accurate statement of the law as above in this able treatise by *the learned counsel for the plaintiffs-in-error.*

The amendment above referred to changed the ruling in the celebrated *Bardes case* (cited, *supra*), that the jurisdiction of suits *by the trustee* rested *exclusively* in the State Courts, only so far as to grant *concurrent* jurisdiction to the bankruptcy court in the particular cases specifically mentioned in the amendment, and no others (*Gregory vs. Atkinson*, cited *supra; Brandenburg on Bankruptcy*, 3d Ed., Sec. 574); but this decision, and the other authorities above cited, in affirming the existence and propriety of jurisdiction in the State Courts, are still sound law.

(b)

But plaintiffs in error seek to take this cause out of the operation of the general rule so clearly announced in Statute and decision, *by the claim that the single fact of the possession by the bankruptcy court of the proceeds of the sale of the mortgaged chattels deprives the State Court of a jurisdiction, which, otherwise, it conced-*

edly would have, a jurisdiction to set aside and declare void the mortgage as fraudulent.

It is thought that plaintiffs in error have misconceived and misapplied the reasoning of certain of the adjudged cases, and have not correctly apprehended the scope of the action under review.

Defendant in error is not here to contend that the bankruptcy court would have had no jurisdiction of this action; but he insists that the State Court *had* jurisdiction.

Diligent research fails to show any decision adverse to the existence of jurisdiction in the State Court, under the precise facts which here obtain; there are many that affirm such jurisdiction. No case has gone to the unseemly extent of declaring that the deposit of the funds in the bankruptcy court, vested that court of *exclusive* jurisdiction of all actions or proceedings, affecting the funds in any manner, directly, collaterally, or incidentally; yet such appears to be the proposition advanced by plaintiffs on this record.

In limine let it be thoroughly understood that:

1. This action did not seek *to recover the fund*, or in anywise *to interfere therewith (Record*, pp. 8, 29, 32, 109).

2. It does not affect the *possession* of the fund *(id.)*.

3. *The judgment under review simply sets aside the mortgage as made to hinder, delay and defraud creditors (Id.)*.

4. It is *a necessary incident* only, of a judgment declaring the mortgage void, that the fund is freed of the lien of the mortgage *(Id.)*.

5. *It is the trustee* himself, *an officer of the Bankruptcy Court (Bankruptcy Act*, Sec. 1, Subdv. 18), who resorted to the State Court, and prayed its hearing of his cause.

6. In seeking this relief, and in its award, no principle of comity was violated, no interference with the Bankruptcy Court was suffered.

Skilton vs. Codington (185 N. Y., 80), is a splendidly considered case in the New York Court of Appeals, in which the Court, by CULLEN, J., sustained jurisdiction by the State Court (pp. 84–86) of an action very similar to that at bar. There, the trustee in bankruptcy, under the order of the Bankruptcy Court, as here, retained a part of the proceeds of the sale of mortgaged chattels for the benefit of any liens that might be established. *The trustee was*

sued by the mortgagee in the State Court to recover the amount of his mortgage; and it was *held*, that *notwithstanding the possession of the fund by the Bankruptcy Court, the State Court had jurisdiction of an action to establish the mortgagee's lien. A fortiori* must the State Court have jurisdiction where the suit is *by the trustee*, as here, and not *against him*, as in the cited case.

A case which bears exactly upon the question in hand, and furnishes precise analogous authority for the jurisdiction of the State Court in the case at bar, is *Bindseil vs. Smith* (61 N. J. Eq., 645). There a trustee in bankruptcy sought to acquire the legal title to choses in action, which, as alleged, had been preferentially assigned to defendant by bill in the Court of Chancery of New Jersey, before bill filed, defendant had been enjoined by the Bankruptcy Court from disposing of the property. It was claimed for the defeudant that the Court had no jurisdiction, because the Bankruptcy Court had taken control of the property. The Court thought that nothing in the bankruptcy proceedings affected the the rights of the trustee to determine for himself in what forum, within those permitted by law, he would bring his action. And the Court said (p. 647):

> "The question whether the District Court has, by its injunction, taken such control of the property as will interfere with the power of the defendant to surrender it to the trustee, in case the Court of Chancery should require him to do so, will be more properly presented for consideration after the right of the trustee is ascertained. *It is unlikely that any difficulty can arise, seeing that the trustee has been appointed by the federal court, and that according to the decision of the Federal Supreme Court, the jurisdiction of the state court is complete.*"

Re Platteville Foundry and Machine Co. (147 Fed. Rep., 828, 831-2), the United States District Court for the Western District of Wisconsin, SANBORN, J., refused to enjoin a suit for trover in the State Court against the trustee in bankruptcy, by a chattel mortgagee, where the mortgaged chattels had been sold by the trustee, and the bankruptcy Court had the funds, and said:

> "By the action of trover, sought to be restrained under this order, *the mortgagee in no way seeks to divest the possession of the Court of the proceeds of the sale. The object of that suit is to test the validity of the mortgage* and the right of the mortgagee to a judgment against the trustee."

That the trustee may be sued in trover in the State Court is also held in the following cases:

> *Truda v. Osgood*, New Hampshire Supreme Court, 71 N. H., 185. holding that *the State Courts have concurrent jurisdiction of all actions to try the title to a bankrupt's property, even where the trustee has possession thereof*, provided the form of the action is such that *the judicial custody thereof is is not interfered with.*
>
> *Re Spitzer*, Second Circuit Court of Appeals, 130 Fed. Rep., 879.
>
> *Re Kanter & Cohen*, same Court, 121 Fed. Rep., 984.
>
> *Re Russell*, same Court, 101 Fed. Rep., 248, 250.

Notwithstanding the possession of the fund by the Bankruptcy Court, it is perfectly proper, and consistent with comity, as has been said already, to permit the trustee to sue in the State Court, to avoid the mortgage; for such a suit does not interfere with the possession of the fund; and the fact that it involves matters having a close connection therewith, does not inhibit the State Court from accepting jurisdiction (*Guaranty Trust Co. vs. North Chicago St. R. Co.*, 130 Fed. Rep., 801). In the case cited, the Seventh Circuit Court of Appeals learnedly considers the rule applicable in circumstances similar to those here, and refuses to enjoin a suit in a State Court affecting collaterally a subject matter in the possession of the Federal Court; and further holds that where the suit in the State Court asks for relief which might be an interference with the possession of the Federal Court, that this does not warrant enjoining the suit, where the principal relief sought would not be a direct interference. The Court cannot fail to find this case helpful, and in entire support of defendant's position here.

In *Buck vs. Colbath* (3 Wall., 334), a case in this Court, it was held that a United States Marshal having goods in his possession might be sued in trover in the State Court, and Mr. Justice MILLER said (p. 345):

> "But it is not true that a Court having obtained jurisdiction of a subject matter of a suit, and of the parties before it, *thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court*, and in some instances requiring the decision of the same question exactly."

Where the trustee, as here, voluntarily submits to the jurisdiction of the State Court, he is bound by the judgment :

Scott vs. Kelly, in this court, 12 Nat. Bk. Reg. Rep., 96.

Winchester vs. Heiskell, also in this court, 119 U. S., 450, s. c. 120 U. S., 73, holding that because the trustee is bound, the creditors are also bound.

Re Reynolds, 133 Fed. Rep., 585, 587. HUNT, J. United States District Court, District of Montana.

(c)

A multitude of cases were cited in the courts below by plaintiffs here, in alleged support of their contention that the state court had no jurisdiction of this cause. They, and any which may or can be cited here, stand for the proposition, simply, that where the fund is in the bankruptcy court, that court has jurisdiction of actions or proceedings to distribute it, and try title thereto ; in none is this jurisdiction claimed to be exclusive ; in none, in fact, was the question presented which is attempted to be made here.

Counsel will endeavor to consider and analyze the more prominent of these cases, which are likely to be relied upon here.

In the case of *Ryttenberg vs. Schefer* (131 Fed. Rep., 313), cited below by plaintiffs here, *the defendant consented* (pp. 317, 318) to the jurisdiction of the bankruptcy court. Under Section 23*b* of the Bankruptcy Act this consent conferred jurisdiction. There was no question of exclusive or conflicting jurisdiction in the case.

Re Leeds Woolen Mills (129 Fed. Rep., 922) simply decided that where property was in the custody of the Bankruptcy Court, that Court could determine the rights of all claimants thereto. There was no question of exclusive jurisdiction ; indeed, the Court expressly said (p. 923) :

> "* * * the simple fact of this possession by the referee in bankruptcy is conclusive in favor of our jurisdiction. By that possession the goods were *in custodia legis*—whether rightfully or wrongfully is another question. But that question may be rightfully decided by us. *Whether it might also be rightfully decided by any other jurisdiction it is not necessary to determine.*"

Re Lucius (124 Fed. Rep., 455) concerned merely the jurisdiction of the Bankruptcy Court to determine the bankrupt's right to

an exemption—a question very different from that here. The case has no bearing whatever, and was very ill-cited.

Re Rodgers (125 Fed. Rep., 169, 177) simply holds that the Bankruptcy Court has jurisdiction when the property is in its possession; it relates in no way to the question of exclusive jurisdiction. It is not seen that *Central Trust Company of New York vs. Worcester Cycle Mfg. Co.* (128 Fed. Rep., 483) has even the slightest bearing on the question under consideration.

The head-note *Re Antigo Screen Door Co.* (123 Fed. Rep., 249), quoted below by plaintiffs here, is misleading. The Court *does not* there decide that the Bankruptcy Court, having possession of the property, has *exclusive* jurisdiction; it simply holds that it *has* jurisdiction. That was the only question of jurisdiction presented for decision in that case. Any decision or statement that the jurisdiction found to exist in the Bankruptcy Court was exclusive must be purely *obiter*, though a perusal of the opinion shows that no such statement is made therein, and the head-note is thus unsupported by the opinion in the particular mentioned. Moreover, in that case, the stipulation under which the property was sold, and the money deposited in the Bankruptcy Court, provided that the claimant, a bank, might proceed *in the Bankruptcy Court* to enforce its rights (p. 251, Statement of Facts). There was no such provision in the stipulation in the case at bar. In the case cited, too, the application was directly *for possession of the fund.* Here the action does not affect the fund or possession thereof, except consequentially, as it affects the mortgage; the possession of the fund is not sought, nor interfered with.

Re Kellogg (113 Fed. Rep., 120), cited in the case last considered, and quoted from at length below, by plaintiffs here, is merely a cumulative statement of the rule, against the soundness of which defendant has no disposition or interest to contend, that the bankruptcy court, having possession of the fund, may determine the rights of claimants therein; it is not a decision that the bankruptcy court's jurisdiction is exclusive—that question was not in the case—and that another court might, with propriety, pass upon the validity of a transfer claimed to be a lien on the fund, was expressly recognized by the Court in the case cited, when it said, at page 123:

> "* * * the district court * * * had jurisdiction to hear and determine the issues presented in the nature of a claim to, or lien upon, the assets of the bankrupt estate. * * * *It may be quite true that the trustee, in the*

exercise of discretion, had a right to institute an action in the proper tribunal to annul the mortgage on account of its invalidity due to its usurious origin. But, manifestly, where two remedies are open to a trustee, one affording relief in the forum creating his trust, and pointing out a very simple and less expensive method of attaining his end than is attainable by the other; then the trustee's duty is to pursue that remedy according to the nature of the controversy, where Congress intended such remedy or procedure should be instituted."

In the case cited the Court intimated that if proper application had been made, the controversy would have been determined in the State Courts (p. 126, *supra*).

Re Whitener (105 Fed. Rep., 180), is of no assistance to plaintiffs-in-error. It decides that the bankruptcy court may enjoin a suit in the State Court against its trustee *to recover possession* of property in his custody. *This* is not an action *against* the trustee to take property from him, but an action *by the trustee* to set aside a transfer. The distinction is manifest from its mere statement. *Carter vs. Hobbs* (92 Fed. Rep., 594) is, obviously, overruled by the *Bardes* case, and other cases cited *supra*. Its citation was inexcusable. *Re Matthews* (109 Fed. Rep., 603) the bankruptcy court had jurisdiction *by consent;* nor was there any question of exclusive jurisdiction.

Re McCallum (113 Fed. Red., 393) is no authority for plaintiffs' position. It was merely an application for leave to sue the trustee in the State Court, which was denied *as a matter of discretion.* The distinction must constantly be observed between suits *by* and suits *against* the trustee. It is adverted to in the case cited, and the reasoning of the opinion shows that there is no doubt of the jurisdiction of the State Courts to entertain suits *by* the trustee, as well as some suits against him. There was no question of exclusive jurisdiction in the case. The Court admitted that it might, in obedience to statutory provision, be proper to determine right to and possession of a fund in a Court other than the Court in possession thereof (p. 294, *infra).* The application in the case cited was *to recover possession* of the fund; here the suit has not such object; it seeks merely to set aside a transfer.

The cases of *Alabama Gold Life Insurance Company vs. Girardy* (9 Fed. Rep., 142), *Covell vs. Heyman* (111 U. S., 176), *Re Tyler* (149 U. S., 164), *Merritt vs. American Steel Barge Co.* (79 Fed. Rep., 228) and *White vs. Schloerb* (178 U. S., 542), cited below by

plaintiffs here, are useless to them. They hold, what is undoubtedly the law, that where a Court or its officer has taken possession of property, the same may not be re-taken by process of another Court, in a suit *against* the officer. That is not this case. This action is brought *by* an officer of the Court said to be in possession. It is not to *divest* him of title or possession, but to perfect his title or possession already existing.

Havens & Geddes Company vs. Pierek (120 Fed. Rep., 244), relied upon by plaintiffs-in-error did hold, as have many other cases, that the bankruptcy court, having possession of a fund by agreement of a creditor of the bankrupt and his trustee, "subject to the order of the court," might, on summary application, determine the rights of those interested in the fund. Defendant does not contend against the principle of this case. He claims the case at bar is not within it. It is notable that in the cited case, the Seventh Circuit Court of Appeals held that *the bankruptcy court would not have jurisdiction of a plenary suit in equity by the trustee against the creditor to determine right in the fund*, such jurisdiction being in the state court alone: a holding very far indeed from plaintiffs' claim here that under similar circumstances the bankruptcy court alone had jurisdiction.

When a court has obtained *exclusive jurisdiction* of a cause or matter, it may indeed enjoin proceedings in another court; but the cases which so hold are of no use to plaintiffs here, because *they start* with the proposition that the first court has obtained exclusive jurisdiction, which is the question here to be determined. Then, if the court having exclusive jurisdiction, or a superior propriety in assuming jurisdiction, fails to enjoin proceedings in another court, they are valid. Plaintiffs here have never invoked injunctive relief against the exercise of jurisdiction by the state court. Nor could they have successfully done so.

In the case of *Guardian Trust Company vs. Kansas City Southern Railroad Company* (146 Fed. Rep., 337), *a case relied upon by plaintiffs here*, the Eighth Circuit Court of Appeals said by SANBORN, J. (p. 340):

> "But the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a Federal Court of Equity and no issue of which it has acquired exclusive jurisdiction presents no ground for a dependent bill to stay it" (Citing many cases).

Whitney vs. Wenman (198 U. S., 539), holds that where the bankruptcy court has possession of property that it may determine the rights of claimants thereto. It does not hold nor infer that such jurisdiction is exclusive. The same is true of *Re M'Mahon* (147 Fed. Rep., 684); and it should be noted that both of these cases arose and were decided *after the amendment to the Bankruptcy Act of the 5th February, 1903*, above referred to.

Bush vs. Elliott (202 U. S., 477), simply holds that the trustee, under Section 23 of the Act, might sue *for a debt due the bankrupt*, in a court in which the bankrupt might have sued therefor, if bankruptcy had not intervened.

It would appear from *First Nat. Bank vs. Title & Trust Co.* (198 U. S., 280), that the chattels in the case at bar *are not in the possession of the bankruptcy court*, within the meaning of the cases upon that point: for in the cited case, as here, the goods were taken by the bankruptcy court from the possession of the claimant, *and sold, with his consent, and the proceeds deposited subject to the further order of the Court* (pp. 280, 283, 287), and it was held, that the bankruptcy court was without jurisdiction to distribute the fund, Mr. Chief Justice FULLER saying (p. 291):

> "The Court of Appeals sustained the jurisdiction of the District Court upon the ground that it had acquired a fund and had jurisdiction to dispose of it, *but we do not think that a court of bankruptcy can create a jurisdiction forbidden by Statute.*"

Mueller vs. Nugent (184 U. S., 1), merely held that the Bankruptcy Court could compel a bankrupt, or one holding property for his benefit, to deliver same to the trustee, *where the person holding same made no adverse claim thereto*, but simply refused to surrender same; and so of *Re Munice Pulp Co.* (139 Fed. Rep., 546).

Any other cases in the books, which may be cited to this point, will be found, on close examination, to have no more application thereto than the cases above considered.

(*d*)

It is probable that even in the absence of an express act of Congress the State Courts would have jurisdiction of suits by a trustee, no act to the contrary existing: for they are nothing more than the

assertion of property rights, of the title to which the Bankruptcy Act is the source (*Cook vs. Waters*, 9 Nat. Bk. Reg. Rep., 155).

The Act provides (Section 70*a*):

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt to all * * * * (4) property transferred by him in fraud of his creditors."

In general, it has been held that if the Federal Courts be not given exclusive jurisdiction of a subject-matter, the State Courts have concurrent jurisdiction thereof, whenever, by their own constitution, they are competent to take it; *jurisdiction in the State Courts exists where it is not excluded by express provision*, or by incompatibility in its exercise, arising from the nature of the particular case (*Claflin vs. Huseman*, 93 U. S, 130, 136, where is a very learned and interesting discussion of the subject in a bankruptcy case).

Even assuming that the complaint demanded, and the judgment awarded, more relief than the Court could give, the latter is only *pro tanto* void (*American Ins. Co. vs. Fisk*, 1 Paige, N. Y., 90).

As was pointed out in the preliminary statement (Subdivision 2), there was no court selected by agreement or contract, to try the issues disposed of herein. No court was named for that purpose, and the strong and inevitable inference is that the parties contemplated a suit, such as was brought in the State Courts, where all trustee's suits were brought at the time the order was entered, July, 1902. Moreover, the trustee is not bound by the alleged contract or agreement, which was not made with him, nor even with the Receiver, but privately, between certain creditors and the chattel mortgagees (*Record*, p. 14), in which the funds were designated *as a Special fund*, to distinguish them, manifestly, from ordinary funds in the bankruptcy courts' possession. The selection of the Receiver to hold the funds was the selection of a mere stakeholder—anybody would have served—and from aught that appears it is chance that the person selected happened to be an officer of the bankruptcy court.

Nor can jurisdiction be conferred by consent upon a court which has none, nor does public policy sanction the selection by agree-

ment of any particular court (ousting all others) for the trial of any particular cause (17 *Am. & Eng. Encyc. Law*, 2d Ed., pp. 1060-1063).

The claim of plaintiffs-in-error to a contract right to try this cause in the bankruptcy court has no support in fact or in law.

The claim of plaintiffs-in-error that the action here could be tried only in the bankruptcy court is not the claim to an *immunity* under or within the meaning of Section 709 of the Revised Statutes, nor to a *title, right*, or privilege thereunder.

It is not believed that the imperfect and partial possession of the funds in this case, which the record shows the bankruptcy court to have, is in any sense sufficient to change the ordinary rule giving the State courts jurisdiction, for in every bankruptcy case, as soon as an adjudication is made, the bankruptcy court is constructively in possession of all the property of the bankrupt, and the mere fact of an adjudication gives the bankruptcy court a power and dominion over the bankrupt's property which has been likened to an attachment (*State Bank vs. Cox*, 16 Am. Bk. Rep. 32; *York Mfg. Co. vs. Cassell*, 15 Am. Bk. Rep., 638; S. C. 201 U. S., 344; *Mueller vs. Nugent*, 184 U. S., 1; *Re Granite City Bank*, 137 Fed. Rep., 818); and notwithstanding this possession of the bankrupt's property, which the bankruptcy court thus has *in every case*, the State courts have universally entertained actions by the Trustee.

Plaintiffs-in-error have taken no steps to oust the state court of jurisdiction. They have joined with defendant-in-error Vollkommer in a thorough litigation of the issues upon the merits, extending the same to the highest State court which could hear the cause. After being defeated, the plaintiffs now seek to rid themselves of the operation of the judgment by a pure technical claim that the court had no jurisdiction, and without any pretense that the judgment would have been otherwise if the cause had been tried in the bankruptcy court. The trustee in seeking the jurisdiction of the State Court followed the approved and universal practice at the time. He would have found it hard to convince the bankruptcy court that it had jurisdiction.

II.

A trustee in bankruptcy may maintain an action to set aside a fraudulent conveyance, whether representing judgment creditors or not.

Whether he can or not, is not a federal question. He may have the capacity to do so, under State laws, which will be followed here.

It does not appear in this record that the trustee did not represent judgment creditors. The inference is that he did.

The point that the trustee did not represent judgment creditors was not taken at the trial, and cannot be made here.

(a)

The capacity of the trustee to sue to set aside conveyances conferred by the provisions of the Bankruptcy Act above referred to is reinforced and extended by the ample statutory provisions of the laws of the State of New York. The first statute on the point was Chapter 314 of the Laws of 1858. Through various amendments, with ever-broadening language, it has passed into its present form as Section 7 of the Personal Property Law (Ch. 417 L. 1897), and, so far as material, reads as follows:

> " An executor, administrator, receiver, assignee or trustee may, for the benefit of creditors or others interested in personal property held in trust, *disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor*, including himself, interested in such estate or property, and a person who fraudulently receives, takes or in any manner interferes with the personal property of a deceased person, or an insolvent corporation, association, partnership or individual, is liable to such executor, administrator, receiver or trustee, for the same or the value thereof, and for all damages caused by such act to the trust estate."

This statute sweeps away at once any force in the point of plaintiffs-in-error that the trustee has no right to maintain the

action, especially when the scope and effect of the statute are seen in the light of the able opinion in *Southard vs. Benner* (72 N. Y., 424), construing the statute. The case cited clearly, and with luminous reasoning, holds that an assignee in bankruptcy (or other similar trustee), by virtue of the act adverted to, may sue to annul a fraudulent transfer and to recover the property, though there may be no judgment creditors; that the trustee, for this purpose, has the capacity and is competent to enforce the rights of simple contract creditors. That was an action to *recover property*, and incidental thereto, a mortgage was declared fraudulent.

The case cited is a companion to numerous cases in the State and Federal Courts holding with clear and certain reasoning the same proposition:

Skilton vs. Codington, New York Court of Appeals, CULLEN, J., 185 N. Y., 80, 87.

Zartman vs. National Bank of Waterloo, First Appellate Division of New York Supreme Court, 109 App. Div., 406, 413.

Mitchell vs. id, United States District Court, Eastern District of North Carolina, 147 Fed. Rep., 280, 285.

Re Pekin Plow Co., Eighth Circuit Court of Appeals, 112 Fed. Rep., 308.

Matter of Metropolitan Store and Saloon Fixture Co., United States District Court, Southern District of New York, 15 Am. Bk. Rep., 119.

Shreck vs. Hanlon, Supreme Court of Nebraska, 104 N. W.. 193.

Sheldon vs. Parker, Supreme Court of Nebraska, 92 N. W., 923.

Crary vs. Kurtz, Supreme Court of Iowa, 105 N. W., 590, 592.

Mueller vs. Bruss, Supreme Court of Wisconsin, 112 Wisc., 406.

Bunnell vs. Bronson, Supreme Court of Errors of Connecticut, 63 Atlantic Reporter, 396, 398.

Basley vs. Coggins, Supreme Court of Florida, 12 Am. Am. Bk. Rep., 355.

Andrews vs. Mather, Supreme Court of Alabama, 9 Am. Bk. Rep., 296.

The cases cited by plaintiffs-in-error do not sustain their claim. *Hewitt vs. Berlin Machine Works* (194 U. S. 296) related solely to the position of the trustee under the New York Statute regu-

lating conditional sales, and held that he had no better title to goods conditionally sold than had the bankrupt. It was not the case of a fraudulent conveyance by the bankrupt, which a creditor might attack, as here. This case is distinguished in *Skilton vs. Codington* (185 N. Y. 80, 88). So, too, of *York Manufacturing Company vs. Cassell* (201 U. S, 344), referred to in *Skilton vs. Codington* (*supra*, at p. 89).

If these cases had been actions to annul fraudulent conveyances, which rest upon a very different basis, and in which the trustee is clothed with a large right of attack, under the Bankruptcy Act, the decisions would have been very different.

New York Economical Printing Company (110 Fed. Rep., 514) was a case of a chattel mortgage void for non-filing, and not a case of fraud. It is in no sense an authority for the position of the plaintiffs-in-error; and as to what it does hold, it was expressly disapproved in the case of *Skilton vs. Codington* (cited *supra*), and it is submitted that this later case is of higher authority, being a decision by the highest State Court upon a question of State law, which the federal courts are bound to respect.

It is notable that in this case of *Skilton vs. Codington* the Court of Appeals reversed the Appellate Division decisions in the same case (reported, 86 N. Y. App. Div., 166, and 105 N. Y. App. Div., 617). The First Appellate Division decision of the case was much relied upon in the courts below by the plaintiffs-in-error and has since been expressly disapproved and overruled as just pointed out.

(b)

That the Trustee's capacity to sue is not a federal question was held in *McKenna vs. Simpson* (129 U. S., 506).

State laws are followed in determining the validity of a chattel mortgage in bankruptcy proceedings; and if the State Court finds fraud the Federal Court, including this Court, will follow and be bound by the adjudication.

Thompson vs. Fairbanks, 196 U. S., 516, 522.
Re Beede, 138 Fed. Rep., 441.
Re First National Bank, 135 Fed. Rep., 62, 65.

And where, under the Bankruptcy Act, the creditors or trustee, could not avoid a conveyance, but under the State law the creditors

could have done so, the trustee, under Section 70*e* of the act, as the successor of the rights of the creditors, can avoid the same (*Empire State Title Company vs. Trustee of Wm. F. Fisher & Co.*, Court of Errors and Appeals of New Jersey, 60 Atlantic Reports, 940).

(c)

As appears from subdivision 8 of the preliminary statement, the *record* nowhere discloses that the trustee *did not* represent judgment creditors. The entire bankruptcy record was in evidence before the trial Court, but is not returned here. The Court below having passed upon *all* the evidence will be presumed here to have found therein sufficient support for its judgment, and if this Court is of opinion that the trustee must have represented judgment creditors, in order to recover, it will presume, from this record that he did. This principle is so trite as not to need the citation of authorities.

(d)

As also appears at subdivision 8 of the preliminary statement, no motion was made at the trial based upon the assumption that the trustee did not represent judgment creditors, nor was the point taken in any way. Not having been raised at the trial, the objection cannot be taken now, and, as to this, there is nothing to review in this Court; nor is it necessary to cite authority in support of this position.

III.

The judgment should be affirmed, or the writ of error dismissed, with costs.

Dated: Bar Association, New York, 12th January, 1907.

Respectfully submitted,

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J. FRANK YAWGER,

FRANCIS B. MULLIN,

Of Counsel.

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